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No. 84-1173

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
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JOE VERNON SEARS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises from a racial discrimination complaint filed by the Plaintiff Joe Vernon Sears with the Kansas Commission on Civil Rights on March 8, 1966 and with the Equal Employment Opportunity Commission (EEOC) on October 4, 1966 against the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) and the United Transportation Union's predecessor. On November 1, 1972, following the issuance of a Right to Sue letter by the EEOC, Sears filed, in a timely manner, a class action complaint on behalf of Santa Fe Train Porters alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., by the Santa Fe and the United Transportation Union (UTU).

This suit alleged and was tried upon two Title VII liability theories: i.e., claims of "disparate treatment" in its hiring practices against Santa Fe [See e.g. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)], and claims of "disparate impact" of their unlawful seniority systems upon the class against both Santa Fe and the UTU [See e.g. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971)]. [Appendix to Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (A) at pages 45-46, 49, 56-57, 64, 67].

Following class certification, the District Court held a hearing after appropriate notice and approved a compromise and dismissal of all back pay and attorneys fees claims between Santa Fe and the Class, except for five (5) Class Members. (Id. at 11-14).[1] Thereafter, the trial of this matter was bifurcated and tried to the District Court in two phases upon an extensive joint presentation by the Plaintiffs and Class Members, the Santa Fe and the UTU of stipulated facts, stipulated summaries of the testimony of witnesses and numerous stipulated exhibits.

On June 14, 1978, the Trial Court entered its decision on the liability aspects of this case (Id. at 15-62), finding in favor of the Plaintiffs and Class Members and against the Santa Fe and the UTU on a "disparate impact" theory, holding that the Santa Fe's and UTU's seniority systems perpetuated, post-Act, the effect of such defendants' prior discriminatory practices towards the class (Id. at 42-49). The Trial Court applied the four factors set forth in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 at 355-356 (1977) [*Teamsters*], to determine that

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1. Prior to trial, Santa Fe entered into Covenants Not to Sue with these five Class Members but remained an active party in this proceeding until the entry of the carry-over seniority relief. (Id. at 126-131).

the Santa Fe's and UTU's seniority systems were created and maintained with the racially discriminatory intention of depriving the Class Members of brakeman and conductor jobs and concluded that the seniority systems were not *bona fide* under Section 703(h) of Title VII [42 U.S.C. §2000e-2(h)]. (A at pages 50-57). Lastly, the District Court concluded that the Class Members had proven their "disparate treatment" case against the Santa Fe (Id. at 45-46, 58-61).

On October 23, 1978, the Trial Court entered its decision establishing the principles which would govern the seniority and back pay relief to be afforded to the Class Members and the framework for awarding such relief. (Id. at 63-82). In this regard, the District Court noted that it had already concluded:

> [T]hat the seniority system entered into between the UTU or its predecessors and the Santa Fe was not bona fide under 703(h) of Title VII, because it had its genesis and was created and maintained in racial discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). . . . Liability was therefore properly imposed on a discriminatory impact theory for the perpetuation of past discrimination by the invalid seniority system after the effective date of Title VII. We held that the UTU was equally responsible with the Santa Fe for the creation and maintenance of the invalid seniority system, and that creation and maintenance of the invalid seniority system, and that liability could be imposed on the UTU. Monetary relief and attorneys' fees may be awarded against the UTU, while seniority relief may be awarded against both the UTU and the Santa Fe. Seniority relief was also held an appropriate remedy

against the Santa Fe for the post-Act discrimination against the plaintiff class. The Court held that the UTU engaged in no post-Act discriminatory conduct against the plaintiffs. (Id. at 64).

In fashioning the actual relief, the District Court divided the Class Members into two different groups or subclasses; i.e., ones who had retained the right to work as Train Porters after Title VII went into effect and those whose Train Porter seniority rights had been abrogated by virtue of Award 19324 of the National Railroad Adjustment Board on October 14, 1959.[2]

Citing *Teamsters*, the District Court ruled that the Train Porter group who had lost its seniority rights were only entitled to seniority relief by virtue of the Santa Fe settlement. (Id. at 68 and 72-73). The District Court further held that the other group would be treated as newly hired brakemen, as of the effective date of Title VII, for the purposes of seniority relief against both the Santa Fe and the UTU and for the purposes of computing back pay awards against the UTU under its formula. (Id. at 69-72).

Both the UTU and Santa Fe appealed the District Court's liability decision to the United States Court of

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2. Commencing not later than 1920, the UTU's predecessors, through letter requests, demands, legislative lobbying and proceedings before the Train Service Board of Adjustment, the National Railroad Adjustment Board, First Division and various other courts, had sought to eliminate the Train Porter position on Santa Fe and acquire these braking positions for their membership. (Id. at 31-33). Relying primarily upon their seniority rights under their labor agreements with Santa Fe and their status as the certified bargaining representative for Santa Fe brakemen, the union was ultimately successful in abolishing the Train Porter position on Santa Fe in 1959. Only those train porters who had seniority rights prior to April 20, 1942 retained any right to perform braking duties on the Santa Fe after Award 19324. (Id.).

Appeals for the Tenth Circuit (Tenth Circuit). All parties—the UTU, the Santa Fe and the Class Members—appealed the District Court's remedy decision. On March 11, 1981, the Tenth Circuit affirmed in part, reversed in part, and remanded this case to the District Court for further proceedings consistent with its opinion.

As its opinion discloses, the Tenth Circuit affirmed all of the District Court's factual findings regarding the liability of the defendants for the racially discriminatory effect of the seniority systems upon the Class. Although the Tenth Circuit concluded that the District Court had erred, as a matter of law, in its application of two of the four *Teamsters* factors to the facts herein (Id. at 94-95), it affirmed the District Court's underlying conclusions that Santa Fe's and UTU's seniority systems were created and maintained with the intention of racially discriminating against the Class. (Id. at 89-90). Based upon its own analysis of the *Teamsters* factors, it found that these seniority systems were not *bona fide* under Section 703(h) [A at 93-97] and that they operated in such a manner as to violate the Class Members' Title VII rights by perpetuating the effects of Santa Fe's and UTU's pre-Act discrimination against the Class. (Id. at 97-100).

Reviewing the lower Court's remedy decision, the Tenth Circuit determined that the District Court had erred, as a matter of law, in concluding that the UTU was not liable for back pay to those Class Members who had no post-Act right to work as Train Porters. (Id. at 101-103). Lastly, it found Trial Court error in the legal conclusion that the typical length of service with Santa Fe of a Class Member retaining post-Act Train Porter seniority rights could not be taken into consideration in determining the level of pay which he would have received absent the discrimination. (Id. at 103-108). However, in its reversal

of these portions of the lower Court's remedy decision, the Tenth Circuit disturbed no factual findings of the District Court.

On July 31, 1981, following the Tenth Circuit's denial of the UTU's Petition for Rehearing and Rehearing *En Banc,* the UTU filed a Petition for a Writ of Certiorari with this Court. [50 U.S.L.W. 3205 (U.S. July 31, 1981) (Case No. 81-221)]. On May 3, 1982, this Court denied the UTU's Petition. (456 U.S. 364).

On June 1, 1981, June 10, 1982 (A at 118-124), July 13, 1982 (Id. at 126-137) and November 23 and 24, 1982 (Id. at 139-160) proceedings were held before the District Court to implement the Mandate of the Tenth Circuit. On December 1, 1982, the District Court entered its Journal Entries of Judgment finalizing its implementation of the Tenth Circuit's Mandate (Id. at 160-165) and the UTU appealed again.

The Tenth Circuit affirmed. Rejecting the UTU's contentions of error in its prior liability determinations (A at 3-4), the Court of Appeals found no abuse of discretion or legal error by the District Court in formulating the Title VII relief herein. (A at 4-10).

On January 15, 1985, the UTU filed its second Petition with this Court. Two of the four QUESTIONS PRESENTED FOR REVIEW in its present Petition are materially identical to the QUESTIONS PRESENTED in its July 28, 1982 Petition to this Court and, primarily, concern the Tenth Circuit's first decision herein. (Compare QUESTIONS PRESENTED numbered 1 and 2 in the instant petition with those numbered 1 and 2 in Case No. 81-221.) The other two questions arise primarily from the Tenth Circuit's second decision herein. (Number 3 and, in part, Number 4).

REASONS FOR DENYING THE WRIT

1. Both of the Tenth Circuit's decisions in this case are consistent with the applicable decisions of this Court; no important question of federal law is involved herein which has not been, but should be, settled by this Court.

a. This Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) is not in conflict with any of the decisions in this case; no important question of federal law has been decided herein which has not been, but should be, settled by this Court.

Ford Motor is fundamentally distinguishable from this case. Furthermore, Petitioner never urged the Trial Court to apply the back pay tolling principles established by *Ford Motor* to its back pay determinations herein and there was no evidence that Petitioner ever attempted to mitigate its back pay responsibilities to the class or that any class member failed to minimize his back pay damages.

The employer in *Ford Motor* was found liable to the claimants in that case upon a Title VII "disparate treatment" claim: i.e., denial of a vacant position at Ford's parts warehouse, for which claimants were qualified, because of their sex. Approximately eighteen months following claimants' initial denial, Ford made an unconditional offer of employment to two of these claimants who, in turn, declined the offer, choosing to remain in the jobs they had obtained subsequent to their initial rejection. This Court held that, absent special circumstances, these claimants' rejection of Ford's unconditional job offer ended the accrual of Ford's potential back pay liability to these claimants, *Ford Motor, supra,* at 241.

The instant case, in contrast, involves a labor union who was found liable to the Class herein upon a Title VII "disparate impact" claim; i.e., racial discrimination against the Class resulting from the creation and intentional maintenance of a seniority system which segregated all Black Santa Fe employees performing braking duties (Train Porters) from the remaining Santa Fe employees performing braking duties (Brakemen) and which denied Santa Fe Train Porters (Black) the wages and other employment benefits received by the Petitioner's members, the Santa Fe Brakemen and Conductors (White). In contrast with Ford's unconditional employment offer, there is no evidence in this case that the UTU attempted, at any time or in any manner, to ameliorate the discriminatory impact of the seniority system upon the Class.

The UTU had both the power and the duty, as the exclusive bargaining agent for Santa Fe brakemen, to, at the very least, attempt to eliminate the unlawful discriminatory effects of the seniority system against the Class Members, and it failed to do so. Consistent with the applicable authorities of this Court, including *Ford Motor*, and with the District Court's factual findings, the Tenth Circuit has twice so concluded. (A at 97-100 and at 3-4).

There are, quite simply, no circumstances in this case to which a back pay tolling principle akin to the principles in *Ford Motor* can or should be applied. Both earlier decisions of the Tenth Circuit are, for that reason, wholly consistent with *Ford Motor*.

Furthermore, *Ford Motor* was decided by this Court on June 28, 1982, before the District Court's back pay hearings on July 13, 1982 and November 23 and 24, 1982. The UTU first raised its present argument in its brief to the Tenth Circuit in its second appeal. (See BRIEF FOR

APPELLANT in Cases Nos. 82-2549, 83-1726, 82-2550 and 83-1736 at pages 8-9.) This Court should not consider an issue which was neither raised nor argued by the Petitioner to the District Court.

b. This Court's decision in *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), is not in conflict with any of the decisions of the District Court or Tenth Circuit.

The legal principles established by this Court in *General Building Contractors* have no application to the circumstances of this case. There is no inconsistency between the legal principles applied by the Tenth Circuit herein and the legal principles enunciated in *General Building Contractors*. These decisions are thoroughly compatible.

General Building Contractors involved questions of liability under 42 U.S.C. §1981. In that case, this Court considered the legal responsibility of the employers and trade associations for the activities of the defendant labor union in operating an exclusive hiring hall system for all operating engineers and would-be engineers.

This case, on the other hand, arises under Title VII and involves no claims under 42 U.S.C. §1981. Moreover, no hiring hall was involved herein. The UTU's liability was predicated solely upon its own activities in intentionally creating and maintaining a non *bona fide* seniority system which had an unlawful discriminatory impact upon the Class. In this case the UTU was *not* found "vicariously" liable by the Tenth Circuit for the hiring practices of Santa Fe under either Title VII or 42 U.S.C. §1981. The theory of *respondeat superior* was never argued by the Class nor was it utilized, in any manner or at any time, by either the

District Court or the Tenth Circuit in any of their opinions. *General Building Contractors* is, for that reason, fully consistent with all of the earlier decisions in this case.

c. The Tenth Circuit properly applied Rule 52(a) of the Federal Rules of Civil Procedure herein; there is no conflict hereinbelow with this Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1983).

Both the District Court and the Tenth Circuit explicitly found that the UTU "intentionally" created and maintained the seniority systems here in question for the purpose and with the express intent of discriminating against the Class. (See e.g. A at pages 57, 64, 90-97 and 100-103). Similarly, both of those Courts found that the seniority systems had an unlawful discriminatory impact upon the Class (Id.) although the Tenth Circuit reversed the Trial Court's legal conclusion that *Teamsters* prohibited an award of back pay relief against the UTU to those Class Members who had no post-Act right to work as Train Porters. (Compare A at page 68 with A at pages 100-103).

In so doing, the Tenth Circuit applied the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure to all of the District Court's findings of fact (A at pages 88-89) and found none to be clearly erroneous (A at 89-90). There is no basis for any contention that the Tenth Circuit's decision is in conflict with this Court's decision in *Pullman-Standard v. Swint, supra.*

d. This Court's decision in *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982), is not in conflict with any of the decisions hereinbelow.

This Court, in *American Tobacco*, concluded that the immunity accorded seniority systems by Section 703(h)

applies to both pre-Act and post-Act seniority systems. The facts and lower court rulings in that case are fully distinguishable from the facts and rulings by the lower Courts in this case.

It was and is undisputed that the seniority systems herein were in existence both pre-Act and post-Act. In addition, it is clear that both the District Court and the Tenth Circuit afforded these systems all of the immunities accorded by Section 703(h) in these proceedings. Both of those Courts expressly found the seniority systems involved herein were not *bona fide* and both of those Courts properly imposed "disparate impact" liability upon the defendants herein in complete accord with *American Tobacco* and other applicable decisions of this Court.

2. The relief afforded to the class herein, including the sum designated as the Tax Component, is in accord with this Court's decision in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) and with other applicable decisions of this Court; no important or recurring question of federal law is involved herein which has not been, but should be, settled by this Court.

The undisputed evidence before the District Court established that the Class Members herein would pay, on a class-wide basis, a total of $1,280,922.04 more in 1982 Federal and State income taxes than they would have paid if these wages and benefits had been received by them in the years when the wages, benefits and taxes should have been received and paid. (See e.g. page 3 and footnotes 3 to 6, inclusive, of Plaintiffs' and Class Members' Reply to Motion of UTU to Strike Tax Component at R., Volume 10 at page 4030).

The Trial Court rejected the UTU's argument that an award of an additional sum to defer, in part, some of

the tax consequences upon each Class Member of receiving, in one year, more than seventeen (17) years of back pay relief was inconsistent with *Pearson v. Western Electric Company*, 542 F.2d 1150 (10th Cir. 1976) or with any of the other cases cited by the UTU in its instant Petition. (See pages 16-17). Citing the legislative history of Title VII and the principles established by this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), the District Court awarded the Class herein an additional sum to defer, in part, the diminishment of each Class Member's back pay award by virtue of the federal and state income taxes payable by each Class Member on the award. (A at pages 149-153).

The Tenth Circuit affirmed, finding no abuse of the District Court's broad Title VII discretion in its fashioning of the relief herein. (A at pages 9-10). Significantly, the Tenth Circuit explicitly held that, although appropriate herein, such relief may not be appropriate "in a typical Title VII case". [Compare A at page 9 (Tenth Circuit's opinion) with A at pages 150-151 (Trial Court's opinion)].

It is obvious that the protracted and unremedied illegal practices of the UTU towards the Class herein persuaded both the Trial Court and the Tenth Circuit that in the absence of such relief the Class herein would not be "made whole" or afforded "complete justice" for the economic injury involved herein. See e.g., *Albemarle Paper Company v. Moody, supra,* at pages 418-421. The decision below is fully consistent with all of the applicable authorities of this Court on the federal law regarding damage awards in Title VII and other cases, including *Albemarle, supra,* See also *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980) [Federal Employers' Liability Act] and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) [Outer Continental Shelf Lands Act].

The decision below involves no important or recurring question of federal law. It does not require either the EEOC or other federal courts to consider the impact of taxes upon back pay awards in typical Title VII cases, since the federal and state income tax consequences upon back pay awards in most, if not all, of such cases would be *de minimis*. Compare *Norfolk & Western R. Co. v. Liepelt, supra,* at page 494 and N. 7 with *Blim v. Western Electric Company, Inc.*, 731 F.2d 1473, 1480 (10th Cir.), ... U.S. ....., 105 S.Ct. 233, 83 L.Ed.2d 161 (1984). The decision below is a factual anomaly and is fully consistent with *Ford Motor* and the other authorities cited in the UTU's instant Petition.

3. The Petitioner herein waived any purported right under 42 U.S.C. §2000e-5(g) to claim that the District Court should have determined the relative degree of responsibility of the labor union and the railroad employer herein for the back pay award; no important or recurring question of federal law was decided by the Tenth Circuit nor do the circumstances herein afford an adequate factual context for this Court to settle any important federal question which has not been, but should be, settled by this Court.

On September 8, 1975, following appropriate notice and a hearing, the Trial Court entered an order approving the compromise and dismissal of the Class Members' back pay and attorneys' fees claims against Santa Fe. (A pps. 11-14). The UTU interposed no objection to the entry of this order nor did it argue, at that time, that Santa Fe's liability to the Class herein for back pay or attorneys' fees should be apportioned to the UTU's liability. The UTU did not object to the Santa Fe settlement nor did it raise any "apportionment" issue in the Pretrial Conference Order

herein (R., Volume 4 at pps. 1687-1736). Furthermore, the UTU, in connection with the District Court's initial remedy decision on October 23, 1978, urged the District Court to give the UTU only a *pro tanto* credit for the amount of each Class Member's Santa Fe settlement under their proposed back pay formula. (See DEFENDANT UTU's PROPOSED FINDINGS ON REMEDIAL DETERMINATION at R., Volume 5 at pages 1983-1984).

The Tenth Circuit, in the first appeal herein, rejected, by implication, the UTU's first argument herein concerning "apportionment." [Compare BRIEF FOR UNITED TRANSPORATION UNION AS APPELLANT AND IN RESPONSE TO BRIEF OF SEARS, ET AL., AS CROSS-APPELLEE in Cases Nos. 78-1995, 78-1998 and 78-1997 at pages 31-32 with A pages 103-108 (Tenth Circuit's first opinion hereinbelow)].

Following the first appeal herein, both the District Court (A at pages 141-142) and the Tenth Circuit (A at page 7) held, by implication, that the UTU waived whatever right it had to require that the UTU's and the Santa Fe's degree of responsibility for the back pay award herein be apportioned. Furthermore, as the Tenth Circuit properly noted (Id. at page 6), none of the cases cited by the UTU in its instant Petition (at page 18) are inconsistent with the District Court's rulings herein. (A at pps. 6-7).

Similarly, the cases cited by the UTU which arise under Section 301(a) of the National Labor Relations Act 29 USC §185(a) are not applicable in this Title VII case. See e.g. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 96-97 (1981). Neither *Vaca v. Sipes*, 386 U.S. 171 (1967) nor *Bowen v. United States Postal Service*, 459 U.S. 212 (1983) have been held to require, as the UTU sug-

gests, the apportionment of damages in a Title VII lawsuit.

Considering the UTU's prior waiver of its purported right to have the back pay award apportioned, this case affords the Court neither a proper factual nor legal context in which to consider this issue. More importantly, the decision of the Tenth Circuit does not resolve this issue, one way or the other.

CONCLUSION

For the reasons stated, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY G. PAUP

and

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Counsel of Record for Respondent Joe Vernon Sears and all remaining named Respondents other than The Atchison, Topeka & Santa Fe Railway Company and The Brotherhood of Sleeping Car Porters

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